



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

HD/JSR:jsr
Docket No: 02324-00
12 April 2001

From: Chairman, Board for Correction of Naval Records
To: Chief of Naval Personnel

Subj: AMENDED RECOMMENDATION IN CASE OF LCDR [REDACTED]
USNR, [REDACTED] 1117

Encl: (1) Copy of BCNR ltr dtd 23 Oct 00 w/encl
(BCNR rept dtd 6 Sep 00 less encls)

1. Enclosure (1) was forwarded for your action.
2. In order to ensure proper implementation, the Board's "RECOMMENDATION" at enclosure (1) is hereby amended to read as follows:
 - c. That a copy of this Report of Proceedings be filed at an appropriate location in Petitioner's naval record, and that another copy of this report be returned to this Board, together with any material directed to be removed from Petitioner's record, for retention in a confidential file maintained for such purpose.
3. The regulations approved by the Secretary of the Navy require that the naval record of Subject officer be corrected, where appropriate, in accordance with the recommendation of the Board.


W. DEAN PFEIFFER

Copy to:
LCDR [REDACTED]



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

HD:hd
Docket No: 02324-00
6 September 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: LCDR [REDACTED], USNR, [REDACTED] 1117;
REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 23 Mar 00 w/attachments
and Subject's ltr dtd 28 Mar 00 w/encl
(2) Memo for Record dtd 12 Jul 00
(3) PERS-85 memo dtd 19 Jun 00
(4) Subject's ltr dtd 28 Jun 00 w/encls
(5) BCNR rept to SECNAV, do no. 14837-88
(6) PERS-85 memo dtd 27 Jul 00
(7) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected to show SPOT promotion to lieutenant commander effective 12 October 1997.

2. The Board, consisting of Messrs. Ensley, Schultz and Swarens, reviewed Petitioner's allegations of error and injustice on 24 August 2000, and pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. Petitioner was ordered to a SPOT promotion billet, Amphibious Squadron Three (PHIBRON 3), in May 1997. He reported on 12 October 1997. The applicable directive, Secretary of the Navy Instruction (SECNAVINST) 1421.3H (Tab A to enclosure (1)), paragraph 6a, provided that receipt of orders to a SPOT billet is enough for eligibility. The

letter of 23 March 2000 from the former commanding officer (CO), PHIBRON 3 (Tab B to enclosure (1)) indicates that because of administrative error by the command, specifically, their mistaken belief that Petitioner had to serve in the SPOT billet for three months (SECNAVINST 1421.3H reflects no such requirement), his application was not forwarded promptly. It was forwarded on 23 December 1997 (correspondence at Tab C to enclosure (1)), too late for the SPOT selection board which, according to the memorandum for the record at enclosure (2), convened on 18 September 1997. Enclosure (2) further reflects that the selectees from this SPOT board received Senate confirmation on 2 March 1998. Per paragraph 10 of SECNAVINST 1421.3H, SPOT promotions are effective on the reporting date or the Senate confirmation date, whichever is later. Petitioner was considered and selected by the 11 February 1998 SPOT selection board, which was confirmed by the Senate on 25 June 1998. Before Petitioner's SPOT promotion could be effected, he was permanently promoted on 1 June 1998 pursuant to selection by the regular Fiscal Year 98 Reserve Line Lieutenant Commander Selection Board. Therefore, he never received any SPOT promotion.

d. Petitioner says he believes he should have been considered by the SPOT board that met in fall 1997, noting his former CO's concession of administrative error that prevented his consideration by that board.

e. In correspondence attached as enclosure (3), PERS-85, the Navy Personnel Command (NPC) office having cognizance over SPOT promotions, noted that Petitioner had been promoted and paid for the grade of lieutenant commander by the time the 11 February 1998 SPOT board was confirmed on 25 June 1998, and that SECNAVINST 1421.3H makes no provision for retroactive appointments or back pay.

f. Enclosure (4) is Petitioner's response to the PERS-85 opinion at enclosure (3). He submits that while it is true SECNAVINST 1421.3H makes no provision for retroactive appointments or back pay, these restrictions are not relevant in his case, where it is clearly established that a SPOT promotion nomination was submitted in a timely manner and in accordance with SECNAVINST 1421.3H. He says he understands why retroactive appointments should not routinely be made, but his position is that a retroactive appointment is appropriate in his case, because of the errors and injustices that prevented his nomination from being considered in a timely fashion by the fourth quarter 1997 SPOT promotion board.

g. Enclosure (5) is the report of this Board in another SPOT promotion case, docket number 14837-88. In this case, which was factually similar in some respects to Petitioner's, the Board's recommendation for relief was approved by the Deputy Assistant Secretary of the Navy (Manpower). PERS-85 was asked to provide further comment on Petitioner's case in light of the decision at enclosure (5).

h. In their response at enclosure (6), PERS-85 adhered to their first opinion. They commented that in contrast to the case at enclosure (5), Petitioner's case involved no delays or misrouted packages "due to the fault of the Bureau of Naval Personnel [BUPERS] that

would warrant special consideration for [Petitioner]." They further stated that although the PHIBRON 3 "failure to take appropriate action when they initially received [Petitioner's] request was unfortunate, it in no way obligates [BUPERS] to assume responsibility for his command's failure to act in a timely manner." Finally, they reiterated that SECNAVINST 1421.3H clearly states retroactive appointments and back pay are not authorized.

CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding the contents of enclosures (3) and (6), the Board finds the existence of an injustice warranting partial relief, specifically, correction of Petitioner's record to show he received a SPOT promotion effective 2 March 1998.

The Board finds that but for an administrative error by Petitioner's command in processing of his nomination for SPOT promotion, he would have been considered by the September 1997 SPOT selection board. Contrary to the advisory opinion at enclosure (6), they find no requirement that the administrative error be committed by NPC in order for this Board to take corrective action. They find the prohibition of SECNAVINST 1421.3H against retroactive appointments does not preclude correcting Petitioner's record, under this Board's authority, to create a fiction that he received a SPOT promotion in the past. Given Petitioner's selection by the February 1998 SPOT selection board, the first SPOT board to consider him, this Board considers it likely that he would have been selected by the September 1997 board, had he been considered by that board as he should have been. The Board finally concludes that had he been selected by the September 1997 SPOT board, his selection probably would have been confirmed by the Senate on 2 March 1998, and he would have been SPOT promoted effective 2 March 1998.

The Board finds the most appropriate remedial action, to allow Petitioner's record to show he was SPOT promoted with pay from 2 March 1998, is to correct the record of proceedings of the September 1997 SPOT selection board to show he was on the list of eligibles and the confirmed list of selectees.

Since the applicable directive states SPOT promotions are effective from the reporting date or date of Senate confirmation, whichever is later, the Board finds the correct effective date is 2 March 1998, rather than the 12 October 1997 reporting date Petitioner requested.

The Board recognizes the Senate confirmation of 2 March 1998 actually did not include Petitioner. However, given that he has been confirmed, they feel the intent of SECNAVINST 1421.3H is satisfied by making his SPOT promotion effective from the date the Senate confirmed the selectees from the September 1997 SPOT board who, if this Board's recommendation is approved, will include Petitioner.

In view of the above, the Board recommends the following limited corrective action:

RECOMMENDATION:

a. That Petitioner's naval record be corrected to reflect that he received a SPOT promotion to lieutenant commander on 2 March 1998, pursuant to title 10 U.S.C. 5721 and 1552, with a date of rank and effective date of 2 March 1998.

b. That the record of proceedings of the 18 September 1997 SPOT Selection Board be corrected to show that Petitioner was on the list of eligibles and the confirmed list of selectees.

c. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

d. That Petitioner's request to show he received a SPOT promotion to lieutenant commander effective 12 October 1997 be denied.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder

Jonathan S. Ruskin
JONATHAN S. RUSKIN
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.

W. Dean Pfeiffer
W. DEAN PFEIFFER

Reviewed and approved:

Joseph G. Lynch 10-12-00

Joseph G. Lynch
Assistant General Counsel
(Manpower & Reserve Affairs)